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No. 86-522

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

COLORADO INTERSTATE GAS COMPANY,
Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR PETITIONER COLORADO INTERSTATE GAS COMPANY OPPOSING BRIEFS IN OPPOSITION

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	7

TABLE OF AUTHORITIES

COURT CASES:

ANR Pipeline Co. v. *FERC*, 771 F.2d 507 (D.C. Cir. 1985) 2

Cities of Batavia v. *FERC*, 672 F.2d 64 (D.C. Cir. 1982) 5

Colorado Interstate Gas Co. v. *FERC*, 791 F.2d 803 (10th Cir. 1986) ..... *passim*

Federal Power Commission v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962) 5

Laclede Gas Co. v. *FERC*, 670 F.2d 38 (5th Cir. 1982) 2

Public Service Commission of New York v. *FERC*, 642 F.2d 1335 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 879 (1981) 2

Sea Robin Pipeline Co. v. *FERC*, 795 F.2d 182 (D.C. Cir. 1986) ..... *passim*

STATUTES AND REGULATIONS:

Section 4, 15 U.S.C. § 717c ..... *passim*

Section 5, 15 U.S.C. § 717d ..... *passim*

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ARGUMENT

This Reply Brief of Petitioner Colorado Interstate Gas Company (Petitioner) is addressed to the briefs filed, in opposition to grant of a Writ of Certiorari herein, by Respondent Federal Energy Regulatory Commission (Respondent or Commission) and by Natural Gas Pipeline Company of America (NGPCA). Both Respondent and NGPCA oppose the grant of certiorari in these proceedings, but on different grounds which disclose the fatal flaws in each of their contentions. A brief review of the basis for grant of certiorari herein shows that fact, and the defects of their position.

The Petition herein has shown the conflict that exists between the decision here under review of the United States Court of Appeals for The Tenth Circuit, and several decisions of the United States Courts of Appeals For The District of Columbia and Fifth Circuits.[1] Such conflict has been ably amplified by the Brief Amicus Curiae filed herein in support of grant of the writ. The District of Columbia and Fifth Circuit decisions have held, consistent with this Court's decisions, that only those portions of a pipeline company's tariffs which the company proposes to change may be suspended,[2] examined and possibly changed by the Respondent Commission under Section 4 of the Natural Gas Act. The unchanged portions can only be examined and possibly changed under Section 5 of the Natural Gas Act. The basic differences between action under Sections 4 and 5 are that under Section 4: (i) the Commission decision can be made effective as of the date the company made the change effective, even if such date is earlier than the date of the Commission decision; (ii) the company bears the burden of proof as to changes proposed by the company, and (iii) the suspension authorization exists. Under Section 5, the decision can only be made effective on or after the date a valid decision is final, and the burden of proof is on those advocating change in the company's tariff terms.

The above principles have been solidly established. These proceedings arise because the Respondent Commission has relatively recently been seeking to escape these basic, elemental principles, so as to try to reverse the

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[1] *Sea Robin Pipeline Co.* v. *FERC*, 795 F.2d 182 (D.C. Cir. 1986); *ANR Pipeline Company* v. *FERC*, 771 F.2d 507, 513 (D.C. Cir. 1985); *Public Commission of New York* v. *FERC*, 642 F.2d 1335 (D.C. Cir. 1980), cert. denied, 454 U.S. 879 (1981); *New Orleans Public Service, Inc.* v. *FERC*, 659 F.2d 509, 524 (5th Cir. 1981).

[2] Indeed, only as to the changes proposed is "suspension" relevant, since the function of suspension is to delay a new provision becoming effective: unchanged provisions are already effective and thus cannot be "suspended", but can be examined under Section 5.

burden of proof and make its decisions retroactive, as to *unchanged* tariff provisions. The District of Columbia and Fifth Circuit decisions cited above have reversed those efforts, but the Tenth Circuit, hereinbelow, did not; it has approved a *retroactive* Commission decision, relative to an *unchanged* provision.

1. Respondent Commission's basic effort to distinguish the District of Columbia and Fifth Circuit decisions, to try to deny the conflict of circuits, is its erroneous claim (Brief, pp. 16-17) that those cases go only to the Section 5 provision as to burden of proof, but not to the Section 5 prohibition against retroactivity. That claim is clearly false, since the applicability of Section 5, and the inapplicability of Section 4, are unitary facts. If Section 5 is applicable, and Section 4 is not, then the burden of proof standard of Section 5, and not of Section 4, applies, *and* the decision reached must be prospective and not retroactive, as Section 5 requires. A given case may involve Commission violation of one of such standards or the other, but both standards are applicable. In fact, in one of the cases which conflicts with the Tenth Circuit decision below, the Commission violated *both* of such standards, and the Court of Appeals For The District of Columbia so held.

> "In *Sea Robin*, the Commission had ordered the allocation of additional costs to, and a corresponding change in the rate level for, a transportation service the rate for which the company had not proposed to change. This allocation resulted in lower rates for other services so that refunds were required of the company." (*Sea Robin Pipeline Company* v. *FERC*, 795 F.2d 182, 187 (D.C. Cir. 1986).

The Commission had made its order retroactive (and thus ordered refunds), and had also utilized the wrong standard for burden of proof, the Court held. The Court therefore reversed the Commission's decision, stating *inter alia*:

> "The first order also exceeds the Commission's authority under section 5 because it mandates retroactive relief. FERC ordered Sea Robin to refund to its customers, other than Gulf, any fees they had paid since June 1, 1980 in excess of the fees they would have paid under the new, Commission-directed methodology. *See Opinion No. 227-A*, 31 F.E.R.C. AT 61,382. Sea Robin had a right to rely on the legality of the filed rate once the Commission allowed it to become effective. FERC may not order a retroactive refund based on a post hoc determination of the illegality of a filed rate's prescription." (Id, p. 189, n. 7)

The Commission's brief in opposition seeks to characterize the Court's holding as to retroactivity as dicta, but that is clearly contrary to the decision, as shown above. The Commission is simply trying to claim that the burden of proof point is the "major" holding of the Court, and then characterize the other holding(s) as "dicta", but that effort conflicts with the Court's actual holdings, and the unavoidable unitary nature of the question involved.

2. NGPCA's opposition to the Petition takes a different tack, by asserting that the Tenth Circuit decision, below, is correct. That, of course, is the question to be decided upon grant of certiorari, rather than now. As briefly noted below, Petitioner respectfully submits that such conclusion is in error: that, instead, it is the decisions of the District of Columbia and Fifth Circuits which are properly decided. But what is significant at this stage is that like the Commission, NGPCA has failed to refute the conclusion that a clear conflict among Circuit Courts of Appeals exists. And neither the Commission nor NGPCA even try to contest the fact that the questions involved herein are of great importance to the administration of the Natural Gas Act, and arise in virtually every rate case arising under that Act. Thus, the classic grounds for grant of certiorari exist here.

The fact that NGPCA, like the Commission, has failed to refute the clear existence of the conflict of Circuits is shown by the fact that in the section of its brief entitled "The Tenth Circuit Decision Is Consistent With Precedent From Other Circuits", NGPCA does not *mention even one* of the cases which have been shown by Petitioner to be in conflict with the decision below. Indeed, three of those four conflicting decisions are not mentioned anywhere in the brief. The fourth—*Sea Robin*, discussed above—is the subject of the third section of the NGPCA brief, in an effort to distinguish it. But that effort is unavailailing. First, NGPCA says that the *Sea Robin* decision states it does not overrule the same Court's prior decision in *Cities of Batavia* v. *FERC*, 672 F.2d 64 (D.C. Cir. 1982). NGPCA then tries to bootstrap on its *allegation* that *Cities of Batavia* is consistent with the Tenth Circuit decision below. In fact, however, what the District of Columbia actually held in *Sea Robin* was that the Commission's action under review there—retroactivity and erroneous burden of proof in a Section 5 case, which is what was upheld hereinbelow—was in error, *and was not* in accord with the *Cities of Batavia* case. Thus, there was no need to "overrule" *Cities of Batavia* in order to reverse the Commission. (See Section III, pp. 10-11, of the Petition herein).

3. As noted above, the major thrust of the briefs of both the Commission and NGPCA is an effort to support the decision below on the merits. If certiorari is granted herein, Petitioner will demonstrate in greater detail that it is the District of Columbia and Fifth Circuits decisions which are soundly decided, and that the efforts of the Commission to avoid its statutory restrictions, and the decision of the Tenth Circuit below affirming such result, are in error. The core of the efforts to support the decision below on the merits [3] is the Commission's claim that

[3] Both the Commission and NGPCA cite this Court's decision in *Federal Power Commission* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962) and argue, to quote NGPCA, that the case establishes that the Commission can act on rate design or minimum

the "minimum bill" provision of the Petitioner's tariff—which Petitioner did *not* file to change—is allegedly an "integral" part of the *level* of Petitioner's rates. Thus, the argument goes, since Petitioner did seek a change in the rate level, it allegedly "opened up" the minimum bill, too, for Section 4 procedures. The connection between minimum bill and rate level, the opponents of certiorari claim, is that if a customer is required to pay for volumes of gas, by the minimum bill provision, it will pay the rate level fixed in the proceedings. However, that argument would read the distinction between Sections 4 and 5 out of the act, since the factor of rate level "interacts" *that way* with *every* tariff provision. In fact, the two topics are separate tariff provisions, and present separate issues, and it is only the provision which the pipeline proposes to change which is subject to the Section 4 standards: all others are subject only to Section 5.

That is the clear holding of the District of Columbia and Fifth Circuits decisions which conflict with the decision below. As NGPCA says (Brief p. 11): "In *Sea Robin*, the Commission had ordered the allocation of additional costs to, and a corresponding change in the rate level for, a transportation service the rate for which the company had not proposed to change. This allocation resulted in lower rates for other services so that refunds were required of the company." (*Sea Robin Pipeline Company* v. *FERC*, 795 F.2d 182, 187 (D.C. Cir. 1986).

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bill issues under Section 4 of the Natural Gas Act "even if the pipeline itself has proposed no change in rate design but only in the overall level of rates". In fact, that is *not* the holding of *Tennessee*. In that case, the Commission decided *only* issues as to which the Company has not proposed a change. In fact, the case arose because the Commission *deferred decision* on rate design issues (which the Company had not proposed to change) and decided only the rate level issues as to which the Company had proposed changes. Thus, the case had no holding—or question—at all as to whether a decision on an issue as to which the Company had proposed no change can be rendered under Section 4 and thus be retroactive. The issue was not involved there at all, contrary to the contentions here of NGPCA and the Commission.

That passage correctly concedes that in *Sea Robin*, the Company had filed a "rate level" change, and the issue decided by the Commission—the methodology for design of rates-- meant that the new rates designed by the Commission would be higher or lower, depending upon the overall rate level decided upon. Despite this "interrelationship", the Court held that only the rate level was a Section 4 issue—since the company had proposed to change it—while the rate design was not, since the company had not proposed to change it. That was also the holding of the other three cases cited by Petitioner as in conflict with the decision below.

Examination of those decisions establishes clearly that:

a. The conflict alleged by Petitioner and Amici herein clearly does exist;

b. The issues involved in such conflict are of great importance;

c. The decisions of the District of Columbia and Fifth Circuits are soundly decided, and the decision below is not.

CONCLUSION

Petitioner respectfully urges that the Court grant the Petition and reverse the decision below.

Respectfully submitted,

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